Supreme Court, U. S.
FILED
MAY 27 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1977

77-
No. 1584

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC. and SNELLING AND SNELLING OF UPPER MANHATTAN, INC.,

Appellants,

v.

PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK and BRUCE C. RATNER, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS

A. BERNARD FRECHTMAN
JOEL A. KLARREICH
122 East 42nd Street
New York, New York 10017
Attorneys for Appellants

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 1584

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC. and SNELLING AND SNELLING OF UPPER MANHATTAN, INC.,

Appellants,

v.

PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK and BRUCE C. RATNER, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS

Appellants submit this response in opposition to Appellee Philip Ross' Motion to Dismiss the Appeal herein or in the

alternative to affirm the judgment of the Court of Appeals on the grounds that it presents no substantial federal question.

I.

Under the caption Counterstatement of the Case (p. 2) Appellee Ross states that the classification of employment agencies subject to the challenged statute is essentially determined on the basis of whether or not they charge a fee. This statement is erroneous. Exempt from the challenged statute are fee charging temporary help service businesses, union hiring halls, employment agencies who deal exclusively in positions paying $20,000 or more per year and who charge only employers and those persons described in General Business Law Section 171 Subdivisions 2(e)(1) and (3).[1]

II.

Under the caption Argument (p. 4) Appellee Ross states that those employment agencies which are subject to the challenged statute "deal with large numbers of women applicants in fee-generating situations" and urge this unsupported statement as justification for the imposition of criminal penalties on duly licensed employment agencies for an act of sex discrimination, implying that a special problem exists.[2] Appellants not only dispute the validity of this assertion, but contend that it bespeaks the question. Appellants do not question the right of the State of New York to license and regulate private employment agencies or even impose criminal sanctions for violations of the General Business Law. What Appellants question is the right of New York State to impose different penalties upon persons similarly situate for the commission of the identical unlawful act.

---

[1] Cited in its entirety in Appellants' Jurisdictional Statement, p. 19-a.

[2] The legislative record of the enactment of the challenged statute is wholly devoid of any supporting facts to justify the necessity for the application of criminal penalties for acts of sex discrimination.

Appellee Ross goes on to state under the caption Argument (p. 5) that the Human Rights Law does provide penal sanctions which are applicable to duly licensed employment agencies that wilfully violate an order of the State Division of Human Rights.[3] This statement is a distortion. No one is subject to penal sanctions for a violation of the Human Rights Law. Persons are subject to penal sanctions only for either wilfully interfering with the enforcement of the statute or wilfully violating an order of the State Division of Human Rights or its Commissioner.

III.

Appellee Ross urges under the caption Argument (pp. 4-5) that the statutes in question serve different purposes and are capable of coexistence and cites *Morton* v. *Mancari* and *Radzanower* v. *Touche Ross & Co.* as support therefor. These cases are inapposite. This is not a situation where there is a conflict between two statutes as was present in *Morton* v. *Mancari* and *Radzanower* v. *Touche Ross & Co.*, but rather a case where two statutes declare the same act unlawful and prescribe disparate penalties for persons similarly situate.

Appellee Ross then argues under the caption Argument (pp. 4-6) that a rational basis exists for the classification at bar as it is reasonable in relation to the purpose of the challenged statute and that "under inclusion" will not vitiate the statute.

---

[3] Section 299 of the Human Rights Law provides as follows:

§ 299. Penal provision

Any person, employer, labor organization or employment agency, who or which shall wilfully resist, prevent, impede or interfere with the division or any of its employees or representatives in the performance of duty under this article, or shall wilfully violate an order of the division or commissioner, shall be guilty of a misdemeanor and be punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both; but procedure for the review of the order shall not be deemed to be such wilful conduct.

As Appellants stated in their Jurisdictional Statement (p. 11), the case at bar does not involve the question of "under inclusion." Here the act (sex discrimination) has been declared unlawful for all, yet only the duly licensed employment agency is subject to criminal penalties while all other persons similarly situate are exempt therefrom.

The Legislature, in adopting the Human Rights Law, has decreed that all persons are prohibited from discriminating on the basis of sex, including both licensed and unlicensed employment agencies, employers, temporary help services, executive recruiters and labor unions. The Legislature, in adopting the challenged statute, has imposed criminal sanctions for the very same unlawful act only upon a tiny percentage of the population without any legislative history, statistics or hearings. This it may not do under the Equal Protection Clause as it may not impose disparate penalties upon persons similarly situate for commission of the identical unlawful act.

CONCLUSION

For the reasons set forth above and those set forth in Appellants' Jurisdictional Statement, we submit that the question presented is significant and substantial and that Appellee Ross' motion to dismiss or in the alternative to affirm on the grounds that no substantial question is presented must be denied.

Respectfully submitted,

A. BERNARD FRECHTMAN
JOEL A. KLARREICH
Attorneys for Appellants

May, 1978